



After reviewing the evidentiary record, hearing the arguments and considering the briefs of the parties, the Appeals Board finds as follows:

Claimant sustained an injury to his neck on August 7, 1986 while he was employed by the respondent when he bent over to pick up a load of cartons. Claimant experienced immediate pain in the back of neck which radiated down his left arm. At the time of the accident, claimant was working in the job classification of a packer operator. The job required claimant to pack family-size and giant-size cartons of soap product into cases on a production assembly line.

Medical treatment was provided by the respondent for the claimant's neck injury, first with James Lipsey, M.D., who treated claimant conservatively with traction at home. Because claimant was not making progress, Dr. Lipsey admitted claimant to the hospital for further traction and physical therapy. During claimant's hospitalization, he was seen by Charles M. Striebinger, M.D., a neurosurgeon, a member of the medical staff at the Shawnee Mission Medical Center. A CT scan was ordered and demonstrated a focal disc herniation at the C5-6 level on the left side. Dr. Striebinger diagnosed C6 radiculopathy secondary to cervical disc herniation at the C5-6 level on the left side. Claimant underwent a cervical laminectomy and disc excision at C5-6 on the left performed by Dr. Striebinger on October 10, 1986.

Dr. Striebinger returned the claimant to his regular job with no restrictions on December 8, 1986. Claimant was followed by Dr. Striebinger as late as July 19, 1991 when he was referred for a third epidural steroid injection because of continuing symptoms in his neck area. At the time claimant last testified in this case, August 11, 1992, he remained employed by the respondent. However, he had been off work since March 15, 1992 because of an additional injury he had received to his neck in an automobile accident.

The Administrative Law Judge found that the claimant had failed to prove a work disability. He awarded the claimant a 15 percent permanent partial general disability based on functional impairment. The narrow question that the Appeals Board will address in this review is whether claimant has presented evidence to prove a work disability.

On the date of claimant's injury, August 7, 1986, the test for permanent partial general disability based on work disability was contained in K.S.A. 44-510e(a)(Ensley) and provided in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the workman to engage in work of the same type and character that he was performing at the time of his injury, has been reduced."

Work disability was determined under this definition by proving what portion of claimant's job he was unable to perform as a result of his work-related injury. See Ploutz v. Ell-Kan Co., 234 Kan. 953, 676 P.2d 753 (1984). Claimant is entitled to the higher of his work disability or functional impairment. See Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

Claimant argues that the weight of the credible evidence proved he was entitled to a permanent partial general disability award of 100 percent based on work disability.

Claimant presented evidence, through his testimony; two of his co-workers; Dr. Edward J. Prostic, an orthopedic surgeon; and Michael J. Dreiling, a vocational rehabilitation expert.

At claimant's attorney's request, Dr. Prostic examined claimant on one occasion, March 3, 1992, more than five years after claimant's date of injury. Dr. Prostic diagnosed cervical disc rupture and carpal tunnel syndrome. Dr. Prostic related both of the injuries to claimant's work activities he performed while employed by the respondent. Taking into consideration both of these injuries, Dr. Prostic opined that claimant had a 20 percent permanent functional impairment. He placed permanent work restrictions on the claimant of no single lift greater than 45 pounds; no repetitive or overhead lifts greater than 35 pounds; and no repetitive or forceful use of the hands.

A considerable amount of the evidentiary record is devoted to an effort to present detailed evidence of the job duties that the claimant was required to perform as a packer operator on the date of his accident of August 7, 1986. The claimant and two co-workers supplied testimony as to these job duties. From its review of that testimony, the Appeals Board finds that at least 75 percent of the packer operator job duties that the claimant was performing at the time of his injury did exceed the work restrictions of Dr. Prostic. Claimant's vocational expert, Michael Dreiling, after applying Dr. Prostic's restrictions to the job duties, testified that the claimant would be able to perform only 25 percent of the packer operator job.

However, claimant was returned to his regular work as a packer operator, after his surgery, on December 8, 1986 by his treating physician Dr. Striebinger. Claimant remained working for the respondent until March 15, 1992 when he was unable to continue working because of a nonwork-related automobile accident. The evidentiary record is somewhat confusing as to whether the job duties that claimant returned to after his injury were the same as the job duties that he had to perform prior to his injury. The Appeals Board finds that the record established that the claimant, after his work-related injury, returned to his regular job classification as packer operator. However, these job duties were changed somewhat, by the respondent, but not as a result of claimant's injuries. The job duties were changed due to a production procedure change. The changed job duties were somewhat easier physically because claimant acted as a relief person which did not require him to constantly be on the production line. The relief duties, however, required claimant to complete the same physical tasks as he had to perform prior to his injury. The claimant did testify and establish that he continued to have symptoms and pain while performing these job duties. He also continued to receive medical treatment at least through July of 1991.

On the other hand, respondent contends that claimant's disability should be limited to functional impairment as he has failed to present credible evidence to establish work disability. Respondent argues that Dr. Striebinger's testimony is the more credible medical evidence that was presented in this case because Dr. Striebinger was claimant's treating physician. Dr. Prostic saw claimant only once for the purpose of expressing an opinion as to functional impairment and work restrictions. Dr. Striebinger testified that as a result of claimant's work-related neck injury he had a 10 percent permanent impairment of function. Dr. Striebinger did not place any permanent work restrictions on the claimant. He opined that once claimant recovered from the neck surgery he did not have any more chance of injuring that particular disc than any other disc in his neck. It was Dr. Striebinger's further opinion that claimant, post-injury, should be able to perform the same activities as he was able to perform pre-injury. Furthermore, Dr. Striebinger did not diagnose claimant with

carpal tunnel syndrome during the period of time he treated claimant. In fact, he referred claimant for an EMG study on February 12, 1988 which was negative.

The Appeals Board finds that although the claimant continued to have some pain and discomfort upon returning to work for the respondent, he performed job duties that were comparable to the job duties that he was required to perform prior to his injury. Claimant demonstrated that from December of 1986 until he was moved to a reconditioning job in 1989 because of problems with his legs, not related to his employment, he retained the ability to perform work that he performed prior to his injury. The Appeals Board finds that greater weight should be given to the testimony of claimant's treating physician Dr. Striebinger than to Dr. Prostic who saw the claimant only once, more than five years after claimant's injury. Dr. Striebinger placed no permanent work restrictions on the claimant and Dr. Prostic restricted claimant because of both his cervical injury and the carpal tunnel syndrome. Dr. Striebinger opined that claimant did not have carpal tunnel syndrome when he returned the claimant to work in 1986. Dr. Prostic testified that even though he attributed claimant's carpal tunnel syndrome to claimant's work activities that he did not know when the carpal tunnel syndrome condition arose.

It is, therefore, the finding and conclusion of the Appeals Board that the claimant has failed to prove that his work-related injury reduced his ability to engage in work of the same type and character that he was performing at the time of his injury. See K.S.A. 44-510e(a)(Ensley). Having failed to prove work disability, claimant's disability, if any, is limited to the percentage of permanent functional impairment. See Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976). The Appeals Board also finds that the 15 percent functional impairment found by the Administrative Law Judge is appropriate and, thus, affirms the Administrative Law Judge's Award entitling the claimant to a permanent partial general disability award of 15 percent.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Alvin E. Witwer, dated August 29, 1994 should be, and is hereby, affirmed as follows:

**AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Edward W. Green, and against the respondent, Colgate Palmolive Company, and its insurance carrier, Liberty Mutual Insurance Company, and the Kansas Workers Compensation Fund for an accidental injury which occurred August 7, 1986, and based upon an average weekly wage of \$607.55.

Claimant is entitled to 18.28 weeks of temporary total disability compensation at the rate of \$247.00 per week or \$4,515.16, followed by 396.72 weeks at the rate of \$60.76 per week or \$24,104.71 for a 15% permanent partial general disability, making a total award of \$28,619.87 which is all due and owing and ordered paid in one lump sum less any amounts previously paid.

Claimant shall be entitled to future medical treatment pursuant to and upon proper application and approval of the Director.

The Kansas Workers Compensation Fund shall be responsible for 65% of all compensation benefits herein awarded the claimant, as well as 65% of all medical and

hospital expenses and temporary total disability compensation previously paid the claimant by the respondent-insurance carrier, and the respondent-insurance carrier is to be responsible for the remaining 35% of all compensation benefits due the claimant or previously paid the claimant, in accordance with the stipulation of the parties filed on December 30, 1992.

Claimant's contract of employment with his attorney has been made a part of the record and is approved and the claimant's attorney is granted a lien against the proceeds of this award to that extent pursuant to K.S.A. 44-536.

All necessary fees to defray the expense of the administration of the Workers Compensation Act for the State of Kansas be assessed 35% against the respondent-insurance carrier and 65% against the Kansas Workers Compensation Fund as follows:

Richard Kupper & Associates	\$488.30
Gene Dolginoff Associates	\$904.80
Rebecca Henson Ramsay, C.S.R.	\$404.90
Appino & Achten Reporting Service	\$ 73.00

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March 1996.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: David O. Alegria, Topeka, KS  
Stephanie Warmund, Kansas City, MO  
Heather Nye, Overland Park, KS  
Alvin E. Witwer, Administrative Law Judge  
Philip S. Harness, Director